

Good Will in Professional Partnerships

Herbert D. Laube

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Herbert D. Laube, *Good Will in Professional Partnerships*, 12 Cornell L. Rev. 303 (1927)

Available at: <http://scholarship.law.cornell.edu/clr/vol12/iss3/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Good Will in Professional Partnerships

HERBERT D. LAUBE*

What is 'good will'?

In 1882 Lord Justice Cotton said that it is "a word of which few people understand the meaning."¹ Nearly a decade before, one writer complained that the American courts and text writers had not given us "very definite notions upon the subject."² Half a century later, another writer advised us that although the American courts recognize the importance of managerial ability as a fundamental element in good will, the judges are "somewhat at sea" regarding it.³

ATTEMPTS TO DEFINE GOOD WILL

Good will is subtle and elusive. It is invisible and intangible. It has been variously defined. Chief Justice Fuller said that although undoubtedly in many cases it is a valuable thing, there is difficulty in deciding accurately what is included in the term.⁴ Of all definitions, Lord Eldon's has been characterized as probably the narrowest.⁵ Lord Eldon is generally quoted as having said that good will "is nothing more than the probability that the old customers will resort to the old place."⁶ An examination of the decision shows that he had under consideration the sale of the good will which was incident to the business of a common carrier, and which was sold with the premises. Sir George Jessel remarked that "Of course in such a business as that there was really nothing more."⁷ But, as was pointed out in *Churton v. Douglas*, "it would be taking too narrow a view of what is laid down by Lord Eldon to say that it is confined to that."⁸ Lord Herschell⁹ was not satisfied that Lord Eldon intended

*Assistant Professor, Cornell Law School.

¹Cooper v. Metropolitan Board of Works, L. R. 25 Ch. D. 472, 479 (1882).

²Redfield, *How the Good-Will is to be Dealt with in Partnerships* (1870) 9 AM. L. REG. (N. S.) 65, 69.

³Foreman, *Conflicting Theories of Good Will* (1922) 22 COL. L. REV. 638, 643.

⁴Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 446, 13 Sup. Ct. 944 (1893).

⁵12 R. C. L. 976, 977 (1916).

⁶Crutwell v. Lye, 17 Ves. Jr. 334, 346 (1810).

⁷Ginesi v. Cooper, 14 Ch. D. 596, 601 (1880).

⁸Johns. 174, 188 (1859).

⁹Trego v. Hunt, (1896) A. C. 7, 16. "If the language of Lord Eldon is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition."

it as an exhaustive definition. Whether he did or not, it has been often so regarded.¹⁰

¶ The more comprehensive conception of good will of Judge Story has received frequent approval. He described it to be "the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general patronage and encouragement, which it receives from constant and habitual customers, on account of its local position, or common celebrity, a reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities or even from ancient partialities or prejudices."¹¹ Wagner does not regard this as exclusive or exhaustive, because it does not include the prestige derived from a trademark or tradename.¹² Bates seems to liberalize the conception. To him, it includes "every possible advantage acquired by the firm in carrying on its business, whether connected with the premises or name or other matter."¹³ To Parsons, good will is "nothing more than a hope, grounded upon probability."¹⁴ To Professor Mechem, that is its substantial essence.¹⁵ That notion of good will erroneously seems to place the emphasis upon the inducement for buying good will rather than upon the advantage or benefit which is purchased. Good will denotes "the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep the connection and improve it."¹⁶

¹⁰"No subsequent definition has changed in any material respect this rendition, and all the writers seem to have recognized and adopted it." Crawford, J., in *Porter & Mumford v. Gorman*, 65 Ga. 11, 14 (1880). "Lord Eldon defined this (good will) about as well as it can be defined . . ." PARSONS, T., *PARTNERSHIP* (4th ed. 1893) 239.

¹¹STORY, *PARTNERSHIP* (6th ed. 1868) § 99. "It would be difficult, if indeed possible, to frame a more accurate and comprehensive definition." HOPKINS, *UNFAIR TRADE* (1900) 132. Mr. Chief Justice Fuller adopted it *in haec verba* in *Metropolitan Bank v. St. Louis Dispatch Co.*, *supra* note 4.

¹²WAGNER, *DAMAGES, PROFITS AND ACCOUNTING IN PATENT CASES* (1926) 331.

¹³BATES, *LAW OF PARTNERSHIP* (1888) § 657. "'Goodwill', I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business whether connected with the premises in which the business was previously carried on, or with the name of the firm, or with any other matter carrying with it the benefit of the business." Vice Chancellor Sir W. Page Wood in *Churton v. Douglas*, *supra* note 8. See brief of attorneys for appellees in *Douthart v. Logan*, 86 Ill. App. 294 (1899).

¹⁴PARSONS, T., *PARTNERSHIP* (4th ed. 1893) 239.

¹⁵MECHEM, *ELEMENTS OF PARTNERSHIP* (1920) 114.

¹⁶LINDLEY, *PARTNERSHIP* (9th ed. 1924) 534. Woerner confuses good will with its price. "It is described as the sum which a person would be willing to give for the chance of being able to keep the trade established at a particular place, or rather it is the price to be paid for the advantage of carrying on the business either on the premises or with the stock of the old firm, or connected therewith by name, or in some manner attracting the customers of the old to the new business . . ." WOERNER, *AMERICAN LAW OF ADMINISTRATION* (3rd ed. 1923) 440.

Why do these ideas of good will vary so widely? Allan attributes the difficulty of definition mainly to the fact that good will is incapable of separate existence.¹⁷ Gilmore thinks that it is partly due to the fact that it has not been recognized as a business asset until comparatively recent times.¹⁸ Perhaps, it is because, as Lindley asserts, "it can hardly be said to have any precise signification."¹⁹ This is doubtless true. Good will varies with the nature of the business to which it is incident.²⁰ Pollock regards the term as commercial rather than legal.²¹ Primarily, good will is a question of fact rather than law. That is the reason that the concept of good will of the economist is out of harmony with the legal concept of good will.²² It is treated as property because "if that which is, in fact, a valuable interest, were not treated as one, injustice would be done."²³ The obstacle to clear perception has been characterized very aptly in *Armstrong v. Bitner*. "Attempts have been made to formulate rules and definitions, which would measure, as by a geometrical scale, the transactions occurring in different departments of business, although they are marked in their detail, and in the mode of their management by a vast variety of features."²⁴ This is what Dean Pound calls a "jurisprudence of rules."²⁵ Lord Eldon's particular application of the concept of good will degenerated into a rule. Many a subsequent decision bears evidence that the judge failed to perform the "useful labor of giving fresh illustration of the intelligent application" of the concept to a concrete cause.²⁶ When one is assured that "only a complete study of a score or more of theories will give one a full understanding of legal good will,"²⁷ one may discover that the theories are founded upon cases which are classified largely upon a basis of similarity of facts.

THE INCIDENT OF GOOD WILL

The much quoted definition of Lord Eldon made good will local. Under the influence of that "ancient idea," only local good will was recognized, in the earlier decisions, as a pecuniary interest.²⁸

¹⁷ALLAN, ON GOOD WILL (1889) 4.

¹⁸GILMORE, PARTNERSHIP (1911) 137.

¹⁹LINDLEY, *supra* note 16.

²⁰Wedderburn v. Wedderburn, 22 Bevan 84, 104 (1856).

²¹POLLOCK, THE LAW OF PARTNERSHIP (11th ed. 1920) 123.

²²FOREMAN, *supra* note 3, at 638.

²³PARSONS, *supra* note 14.

²⁴Bryan, J., in *Armstrong v. Bitner*, 71 Md. 118, 125, 17 Atl. 1054, 120 Atl. 136 (1889).

²⁵*Law in Books and Law in Action*, (1910) 44 AM. L. REV. 12, 20.

²⁶Pound, *Mechanical Jurisprudence*, (1908) 8 COL. L. REV. 605.

²⁷FOREMAN, *supra* note 3, at 639.

²⁸PARSONS, *supra* note 14, foot-note (s).

As late as 1883, it was declared that good will is "never an incident of a stock of merchandise; but generally speaking, it is an incident of locality or place, of the store-room or place of business."²⁹ In *Sheldon v. Houghton*,³⁰ it was stated that it could "adhere to, spring out of corporeal property, or a tangible locality or establishment," but it must rest upon some tangible thing. By the same primitive conception, the good will of a baker³¹ was regarded as clearly incident to his shop, and the good will of an upholsterer³² was inseparable from his leasehold. For some reason, its parasitic adhesiveness localized it.³³

Of course, the foundation of any advantage which one may gain from good will depends upon many things besides place.³⁴ Indeed, "it would be absurd to say, that where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet Street, or in the Strand or any place adjoining, and that they regard that; and do not regard the identity of the house of business,—namely the firm."³⁵ Formerly, location may have been an important and controlling element in good will. Business was done face to face. People acquired the

²⁹*Rawson v. Pratt*, 91 Ind. 9, 16 (1883). In *Van Dyke v. Jackson*, 1 E. D. Smith 421 (N. Y. 1851) the Court, in discussing the good will of a victualing saloon, said that "If it was not thus attached to the place, if it could be detached and used separate therefrom" it was "at least a novel suggestion."

³⁰*Ped. Cas. No. 12, 748, 5 Blatch. 285 (1865)*. "If good will be a 'parasite,' it is a 'parasite' of the business from which it sprung, not the mere machinery by which the business was conducted." *Lacombe, J., infra* note 35. "But the good will of a business may be sold independently. A physician may sell the good will of his practice without selling his office furniture or his surgical instruments. So the lawyer may sell the good will of his clientage without selling his library. The same rule applies to the good will of a mercantile business; in fact to good will generally." *Brett v. Ebel*, 29 App. Div. 256, 258, 51 N. Y. Supp. 573 (1st Dept. 1898).

³¹*King v. Midland Ry.*, 17 Weekly Rep. 113 (1868).

³²*Chisum v. Dewes*, 5 Russell 29 (1828).

³³Good will is either "appurtenant to the ownership of property and the right to occupy the place where the business has been before carried on, or as a separate and distinct right to continue the same business at the same place and in the same name, and to exclude all others from exercising a similar privilege to the extent of infringing the exclusive rights of the purchaser of the good-will. These two species of good-will may conveniently be distinguished as good-will in gross and good will appurtenant to the place and property." *How Good-Will Is To Be Dealt with in Partnerships*, (1870) 9 AM. L. REG. (N. S.) 65, 68.

³⁴*Rowell v. Rowell*, 122 Wis. 1, 17, 99 N. W. 473 (1904).

³⁵*Churton v. Douglas, supra* note 8. In speaking of the publishing house of "Harper & Bros.", Mr. Justice Lacombe said "If its present establishment in Franklin Square were destroyed by fire tomorrow, and everything therein contained were swept out of existence, it is surely manifest that so long as the firm itself survived, and continued to transact its old business, it would still hold its 'good will', although the business should be thence forward conducted in a new building erected in some uptown street, and supplied with entirely new machinery and equipments." *Washburn v. National Wall-paper Co.*, 81 Fed. 17, 20, (C. C. A. 2nd, 1897).

"locality habit."³⁶ With modern methods of distribution, it may have no value. Where a jewelry business³⁷ is a mail order business, the existence of good will can not be dependent upon the fact that "the business should be continued at 49 instead of 51 Maiden Lane." Where less than two per cent of the customers of an importing firm³⁸ visit the store, the importance of good will is dependent on the repute and standing of the name and not upon the location of the business. A literary enterprise,³⁹ jointly pursued, is wholly independent of place. The business can be prosecuted from one place quite as advantageously as from another.

Attempts have been made to classify good will as personal or local.⁴⁰ According to a recent work,⁴¹ local good will embraces three elements: site, building and equipment, and reputation. The third element of local good will is obviously the result of management, which is personal. Long ago, Allan⁴² pointed out that the classification of good will as local and personal is happy so far as it goes, but it does not include those cases where the good will attaches to the firm name. As a rule, good will inheres in the business and not in the locality.⁴³ Certainly, all businesses, not local, cannot be considered as having purely personal good will. Usually, good will is attached to a place, an established business or a name known to the trade.⁴⁴ It may be created in connection with any business, enterprise, occupation or profession.⁴⁵ It may adhere to a locality or an established business, the tangible assets of a trade, the right to use a particular name, trade-mark or valuable trade secret.⁴⁶ The distinguishing feature of local good will is that location is one of the identifying means which people have of determining the place where or the article which they wish to buy.⁴⁷ At any rate, the

³⁶ROGERS, GOODWILL, TRADEMARKS AND UNFAIR TRADING (1914) 17. "The manner of conducting business has changed since that day. The wholesale houses now carry on the mass of their business by means of agents or persons soliciting trade, or through the medium of the mails; customers rarely if ever, visit the place of business." Champlin, C. J., dissenting, in *Williams v. Farrand*, 88 Mich. 473, 520, 50 N. W. 446 (1891).

³⁷*Myers Co. v. Tuttle*, 183 Fed. 235, 237 (Cir. Ct. S. D. N. Y. 1910).

³⁸*In re Silkman*, 121 App. Div. 202, 105 N. Y. Supp. 872, 881 (2nd Dept. 1907).

³⁹*Case and Opinion respecting the "Good Will" of a Newspaper Establishment* (1837) 16 AM. JUR. 87, 88 (1837).

⁴⁰*Ex parte Thomas*, 2 M. D. & DeG. 294, 296 (1841); *Bates*, *supra* note 13.

⁴¹HOPKINS, LAW OF TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION (4th ed. 1924) 218.

⁴²*Supra* note 17 at 8.

⁴³MECHEM, *supra* note 15 at 115.

⁴⁴*People v. Roberts*, 159 N. Y. 70, 83, 53 N. E. 685 (1899).

⁴⁵HOPKINS, *supra* note 41.

⁴⁶28 C. J. 732.

⁴⁷ROGERS, *supra* note 36 at 20.

inadequacy of the classification of the elements of a concept, which are as varied as its applications may be numerous, is obvious. The cases cannot be forced into the "pigeon-holes the books have provided."⁴⁸

Courts have confused productive efficiency, which attracts trade and promotes good will with the good will itself.⁴⁹ When a firm has carried on a particular business for a period of years and "has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of goods dealt in, so absolutely honest and fair in all business dealings that customers of the firm have become convinced that their experience in the future will be as satisfactory as it has been in the past, while such customers' good report of their own experience tends continually to bring new customers to the same concern, there has been produced a value quite as important—in some cases, perhaps, more important—than the plant or machinery with which the business is carried on."⁵⁰ The source of this good will is the scrupulosity, the painstaking industry and honesty of the management. Good will is the result of the qualities of the management. It was created by effort which was personal. The good will which is the result of the effort may be impersonal. In this case it was.⁵¹ Where the members of a firm contribute "intelligence, fortune, credit, or integrity" the firm acquires a reputation which has value.⁵² Good will is represented by that "economic value recognized in law and denoting the chance of future profit."⁵³ In *Williams v. Farrand*, it was said to be "those intangible advantages or incidents which are impersonal, so far as the grantor is concerned."⁵⁴ Must it be impersonal in its origin? If all partners are equally important and efficient in partnership affairs and by joint skill and influence build up a profitable hotel business, is the good will personal or impersonal?⁵⁵ In *Williams v. Wilson and McClellan*,⁵⁶ three partners, conducted an establishment which was in part a private asylum and in part a boarding-house for immigrants. Two were

⁴⁸POUND, *supra* note 25 at 20.

⁴⁹FOREMAN, *supra* note 3 at 652.

⁵⁰Lacombe, J., *supra* note 35 at 20. The reason given, in an early case, for good will not being deemed an asset of a deceased partner's estate was that it "might subsist for the benefit of an executor who may not have skill therein." *Pearce v. Chamberlain*, 2 Ves. Sr. 33 (1750).

⁵¹No one would doubt that, under the decisions, the good will of a firm engaged in the manufacture of wall-paper is so impersonal that it can be assigned.

⁵²*Fenn v. Bolles*, 7 Abb. Pr. 202, 203 (N. Y. 1858).

⁵³*Matter of Borden*, 95 Misc. 443, 444, 159 N. Y. Supp. 346 (1916).

⁵⁴*Williams v. Farrand*, 88 Mich. 473, 50 N. W. 446 (1891).

⁵⁵*Mitchell v. Reed*, 61 N. Y. 123, 127 (1874).

⁵⁶4 Sandf. Ch. 379, 380 (N. Y. 1846).

physicians who were in professional attendance at the asylum. Williams took charge of the internal police and financial arrangements. Two of the partners were excluded by the third. The principal value of the establishment was its good will. The court said "It is useless to trace the origin and growth of this good will. All the partners contributed to it, and whether in equal or unequal proportions, is quite immaterial. It belongs equally to them all."

This language is in striking contrast to that used by another New York court in *McCall v. Moschowitz*.⁵⁷ Three partners were engaged in dressmaking. S. M. Moschowitz was a dressmaking expert. He had charge of the manufacturing department. H. Moschowitz conducted the selling department. McCall took charge of the financial affairs. It appeared that McCall's services were badly needed by the other two, which was the reason for the formation of the partnership. McCall directed from whom and in what amounts goods should be bought. Yet, in an accounting, at the death of McCall, the court instructed the referee not to include good will. In its opinion, the good will depended largely upon the skill of the expert dressmaker. The court did not recognize that it was the service of McCall which made the business a "going concern."⁵⁸ It was he who established that connection⁵⁹ in trade which induced success. Suppose these partners had employed a dressmaker. Then, would there be any doubt that there was a good will which belonged to the partners? Although good will may have its origin in and arise out of qualities of personality, it is merely the benefit which results from the attitude of customers toward the firm.⁶⁰ Courts have failed to perceive that good will depends for its existence upon the attitude of the public rather than upon the continued efforts of the particular partner who was instrumental in creating it. A going concern has a momentum which is of value apart from the continued efforts of the creator of it.

PROFESSIONAL GOOD WILL

Professional good will is merely one kind of personal good will.⁶¹ Story says that good will cannot constitute a part of the partnership effects in a professional business which is "almost necessarily connected with personal skill and confidence in the particular partner-

⁵⁷1 State Rep. 99, 118 (N. Y. 1886). The decision may be justified by an implication of the contract of partnership.

⁵⁸GILMORE, *supra* note 18 at 140. See *Williams v. Farrand*, *supra* note 54 at 483; ALLAN, *supra* note 17 at 1.

⁵⁹*Supra* note 20.

⁶⁰FOREMAN, *supra* note 3 at 646.

⁶¹ALLAN, *supra* note 17 at 41.

ship."⁶² It has often been asserted that good will cannot arise in a professional business.⁶³ If, as Pollock says, good will is a commercial term, rather than a legal one, this is not true.⁶⁴ An editor, a physician or a lawyer often creates an invaluable property right in the form of good will. Whatever may have been the objection to the sale of the good will of a professional man, such sales have long been made. Burdick says that the view that professional good will is not salable, because it is entirely personal, is based largely upon Lord Eldon's narrow definition.⁶⁵ It has been urged that a man cannot divest himself of his personalty. The contention that he can't is irrelevant. It confuses the end of effort with the source of it. The advantages due to efficient services may be so intimately personal as to make them incapable of assignment.⁶⁶ They are not always so.

The good will of a professional business has been said to be so exclusively based upon personal confidence that it is not susceptible of sale.⁶⁷ Yet it is not unusual for physicians and lawyers to sell their practice.⁶⁸ In *Christie v. Clarke*,⁶⁹ the court said that, in fact, every day experience shows that there is a good will attached to a professional as well as to any other kind of business, and that it may be the subject of purchase and sale. If the parties have fixed a price upon it or have provided a means of ascertaining its value, it stands upon the same footing as any other business. In *Hoyt v. Holly*,⁷⁰ which was decided in 1872, a physician in Greenwich who intended to establish himself in the adjoining town, agreed to recommend the defendant to his patients in the village and to use his influence to induce them to employ him. In an action to recover the \$500, which was the consideration of the agreement, it was argued that patients of the plaintiff were entitled to his free, fair and unprejudiced judgment, whenever inquiry should be made of him as to whom they ought to employ as their physician. Any influence exercised upon

⁶²*Supra* note 11 at 173.

⁶³Note, 96 AM. ST. REP. 612; BATES, *supra* note 13 § 668.

⁶⁴"... Where a person acquires a reputation for skill and learning in a particular profession, as for instance, in that of a lawyer, a physician or an editor, he often creates an intangible but valuable property by winning the confidence of his patrons and securing immunity from successful competition for their business, and it would seem well settled that it is a species of goodwill which may be the subject of transfer." 12 R. C. L. 978. See 14 A. & E. ENC. (2d ed. 1900) 1085.

⁶⁵BURDICK, ON PARTNERSHIP (3rd ed. 1917) 373.

⁶⁶ROGERS, *supra* note 36 at 22. In *Read v. Mackay*, 47 Misc. 435, 440, 95 N. Y. Supp. 935 (Sup. Ct. 1905) the court said "It is impossible to transfer the individual attributes of the members of a professional firm so as to invest the transferee with the possession of them."

⁶⁷*Supra* note 2 at 71.

⁶⁸Note on Good Will, 15 Fed. 315 (1883); 14 A. & E. ENC. 1091.

⁶⁹16 U. C. C. P. 544, 550 (1866).

⁷⁰39 Conn. 326 (1872).

them for reward would be fraud, it was urged. By a divided court of 3 to 2, the argument was rejected and the contract held not void.

A consideration of the decisions involving good will, grouped according to specific professions, may serve to clarify the problem. After discussing the first group of cases, it seems desirable to digress briefly in order to disclose the relation which a covenant not to compete, or to retire from practice within a given area, bears to professional good will.

1. *Physicians, surgeons and dentists.* An executrix,⁷¹ who sold the good will of her testator, who was a surgeon-dentist, must account for the £500, which she received for it. Yet where one of two partners, who are dentists,⁷² continues to practice after the other becomes insane, he is not responsible for good will to the other, where he continued on his own account. In *Farr v. Pearce*,⁷³ Farr paid £2000 as a premium to become a partner of Pearce, who was a surgeon, apothecary and man-midwife of experience. By the agreement if either of them should die before the end of 14 years, which was the term of the partnership, the survivor was to "take the whole of the said partnership stocks, monies, goods, debts and effects whatever" and to pay to the deceased's estate his share "according to the yearly account last before made." The surviving partner, under such a contract, would not have to account for good will if it formed no part of the yearly account. But, the Vice Chancellor⁷⁴ said that "if the general question had arisen here, . . . it would have been difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business and sell the connection for the joint benefit of himself and the estate of the deceased partner. When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions, and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships."

Where a surgeon chiropodist⁷⁵ sold her business and the good will

⁷¹*Smale v. Graves*, 3 DeG. & Sm. 706 (1850).

⁷²*Wightman v. Wightman*, 223 Mass. 398, 111 N. E. 881 (1916).

⁷³3 Madd. 74 (1818).

⁷⁴Sir John Leach at 78.

⁷⁵*Brown v. Benzinger*, 118 Md. 29, 84 Atl. 79 (1912). In *Maxwell v. Sherman*, 172 Ala. 626, 55 So. 520 (1911) the court overruled a demurrer to a complaint alleging misrepresentation in the sale of the good will and practice of a physician. In *Bradbury v. Bardin*, 35 Conn. 577 (1869) recovery for fraud in a similar sale was sustained. In *Townsend v. Hurst*, 37 Miss. 679 (1859) a contract was rescinded on the same ground, and the collection of a note given for price was enjoined.

thereof, representing that she was leaving Baltimore, and two months later re-opened an office there, she was enjoined from competing with the vendee within the limits over which her practice had extended, although there was no covenant not to re-engage in business. The vendor received from the sale a sum largely in excess of the tangible assets. To allow her to compete with the vendee would be fraud and in derogation of her grant. In Massachusetts, "The sale of the practice and good will of a physician within certain limits is the legitimate subject matter of a contract, and carries with it the implied covenant, as in other sales, that the vendor will not himself do anything to disturb or injure the vendee in the enjoyment of that which he has purchased."⁷⁶

THE RESTRICTIVE COVENANT

Much of the confusion regarding good will has been attributed⁷⁷ to the failure to distinguish between various forms of good will. Good will has been used to characterize the advantage arising from excluding the retiring partner as a rival in the same business. Historically, the idea of good will seems to have arisen in connection with the legality of covenants in restraint of trade.⁷⁸ Later, it was recognized as of value apart from a covenant. It is sometimes urged that a sale of professional good will consists of nothing more than the advantage which results from the agreement to abstain from competition with the vendee.⁷⁹ If that were true, then the vendee would secure no greater advantage than every other practitioner in the same profession in that community would secure.⁸⁰ The weakness of such a contention lies in the failure to recognize that an

⁷⁶*Dwight v. Hamilton*, 113 Mass. 175, 177 (1873). Generally, the mere sale of good will does not carry with it by implication a covenant that the vendor will not re-engage in the same business. *HOPKINS*, *supra* note 41 at 233; *HIGH, ON INJUNCTIONS* (4th ed. 1905) § 1169. *Harrison v. Gardner*, 2 Madd. 198, 219 (1817); *infra* note 88.

⁷⁷*STORY*, *supra* note 11; *MECHEM*, *supra* note 15; *Lobeck v. Lee-Clark-Anderson Hardware Co.*, 37 Neb. 158, 169, 55 N. W. 650 (1893).

⁷⁸*ALLAN*, *supra* note 17 at 3.

⁷⁹"Neither an editor, a lawyer or a physician can transfer to another his style, his learning or manners. Either, however, can add to the chances of success and profit of another who embarks in the same business in the same field by withdrawing as a competitor." *Cowan v. Fairbrother*, 118 N. C. 406, 411, 24 S. E. 212 (1896). ". . . very frequently the goodwill of a business or profession, without any interest in the land connected with it, is made the subject of sale, though there is nothing tangible in it; it is merely the advantage of the recommendation of the vendor to his connections, and his agreeing to abstain from all competition with the vendee." *Pollock, C. B.*, in *Potter v. Commissioners of Inland Revenue*, 10 Ex. 147, 157 (1854).

⁸⁰In *French v. Parker*, 16 R. I. 219, 14 Atl. 870 (1888), the vendee paid over \$5,000 for the practice, in addition to \$10,000 for the tangible property, of a physician and surgeon.

important advantage which inures to the purchaser of good will arises from the fact that he can hold himself out to the public as the vendor's successor.⁸¹ If the business is dependent upon personal qualities and the vendor does not covenant to retire or refrain from competition, how can the vendee avail himself of the value of succession?⁸²

Lord Eldon aptly characterized such stipulations as merely "another way in which the good will of a trade may be rendered still more valuable."⁸³ In *Munsey v. Butterfield*,⁸⁴ the vendor agreed to sell certain articles of personal property used in his milk business, together with the good will of his milk route. The personal property was worth less than \$1,000. The good will was the most valuable part of the business. The vendor purchased another route which covered the same territory. The vendee refused to perform when he learned of the purchase. The court held that the contract for the sale of the good will of the milk route implied an agreement by the vendor to retire from it and allow the vendee the benefits of it and that he would do nothing to impair or injure it. The vendee did not agree to pay for the right to run a milk route over the territory. He did not have that exclusive right. He did not pay for the right of getting customers. He acquired "the right to the business of running the milk route as the circumstance, the conduct and the influence of the plaintiff had made, and this right could be acquired only by the agreement of the plaintiff not to interfere with the business,—to use the opportunities and influences which had built it up to impair it."⁸⁵ Similarly, where one sold all his right, title and good will to the Oakland paper route,⁸⁶ the court held that the vendor was not at liberty "to filch away from the plaintiff the veritable substance of that which he sold. It was not like the setting up of another business of the same kind, but it was taking away the very thing that he sold." In both these cases the covenant is implied because the consideration paid for good will would fail entirely if it

⁸¹*Knoedler v. Boussod*, 47 Fed. 465, 466 (Cir. Ct. S. D. N. Y. 1891).

⁸²ALLAN, *supra* note 17 at 84.

⁸³*Kennedy v. Lee*, 3 Mer. 441, 452 (1817).

⁸⁴133 Mass. 492 (1882).

⁸⁵*Supra* note 84 at 494.

⁸⁶*Wenzel v. Barbin*, 189 Pa. 502, 42 Atl. 44 (1899). "Suppose a solicitor sells his business, say at five years' purchase, which is by no means uncommon, could he, having offices on the first floor, paint up his name and receive his clients as usual because they choose to come to him, even if he did not actually ask them to come and transact business with him? The answer would be that he was stealing that which he sold, and any conduct more outrageous and more opposed to morality or law could not well be imagined." Jessel, M. R. in *Genesi v. Cooper*, *supra* note 7 at 599.

were not. It was merely a device used to protect the good will purchased.⁸⁷

Generally, according to the decisions, the sale of the good will of a business does not carry with it a restriction not to compete in the absence of an express agreement.⁸⁸ The validity of such covenants is beyond dispute.⁸⁹ In the sale of the practice of a physician, they have been quite common.⁹⁰ Some jurisdictions, however, hold that the sale of the good will of a professional man carries with it the obligation to abstain from practice within the territorial limits of competition with his vendee.⁹¹

2. *Solicitors and attorneys.* Pollock says that in the business of solicitors it seems that good will in the ordinary sense hardly exists.⁹² In *Austen v. Boys*,⁹³ the term 'good will' seemed to the Lord Chancellor wholly inapplicable. He said merely "to sell the goodwill without anything more, and without arranging any price, would be an agreement incapable of being enforced by specific performance." In *Arundell v. Bell*,⁹⁴ Baggalay, L. J., was not prepared to say that in no case of a dissolution of a partnership of solicitors there may not be something analogous to good will. In *Burchell v. Wilde*,⁹⁵ good will was assumed to exist in such a partnership. In *Fitch v. Dewes*,⁹⁶ there was no doubt of it. The cases dealing with good will in winding up professional partnerships are few.⁹⁷ Often, in the discussion of the cases, there is a failure to perceive that, in a commercial sense, there is an actual good will, but that the court is unable to make it available to the vendee. If it cannot, there

⁸⁷FOREMAN, *supra* note 3 at 641.

⁸⁸*Supra* note 76; *Hutchinson v. Nay*, 187 Mass. 262, 264, 72 N. E. 974 (1905); *Morgan v. Schuyler* (dentist), 79 N. Y. 490 (1880); *Faust v. Rohr*, 166 N. C. 187, 197, 81 S. E. 1096 (1914).

⁸⁹*Davis v. Mason*, 5 T. R. 118, 120 (1793); *Boutelle v. Smith*, 116 Mass. 111, (1874); *Beal v. Chase*, 31 Mich. 529 (1875).

⁹⁰*Beatty v. Cable*, 142 Ind. 329, 41 N. E. 590 (1895); *Warfield v. Booth*, 33 Md. 63 (1870); *Mandeville v. Harmon*, 42 N. J. Eq. 185, 7 Atl. 37 (1886); *Niles v. Penn* (dentists) 12, Misc. 470, 33 N. Y. Supp. 857 (N. Y. Sup. Ct. 1895); *Wolff v. Hirschfeld*, 23 Tex. Civ. App. 670, 57 S. W. 572 (1900); *Butler v. Burleson*, 16 Vt. 176 (1844); *McIntyre v. Belcher*, 10 Jur. (N. S.) 239 (1864). In *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826 (1900) covenant restricted practice to specialty within certain territory. See: *Poss v. Roby*, 195 Mass. 292, 81 N. E. 199 (1907); *Boutelle v. Smith* (baker), 116 Mass. 111 (1874); *Faust v. Rohr*, 166 N. C. 187, 81 S. E. 1096 (1914); *Tode v. Gross* (cheesemaker), 127 N. Y. 480, 28 N. E. 469 (1891); *Hitchcock v. Coker*, 6 Ad. & El. 438 (1837).

⁹¹50 Tex. Civ. App. 405, 111 S. W. 768 (1908); *May v. Thomson*, L. R. 20 Ch. D. 705 (1882).

⁹²*Supra* note 21 at 126.

⁹³2 DeG. and J. 626, 636 (1858).

⁹⁴52 L. J. Ch. 537, 539 (1883).

⁹⁵82 L. T. 576 (1900).

⁹⁶*Fitch v. Dewes* [1921] 2 A. C. 158, 168.

⁹⁷*Winding up Professional Partnerships*, (1919) 33 HARV. L. REV. 1070, 1071.

can be no legal good will in that instance. To say that there is no good will in a professional partnership, when an administratrix is required to account for it, if she sells it, is more than strange.

Various reasons have been given for the refusal of the courts to recognize professional good will. It has been deemed too insignificant to be taken notice of.⁹⁸ Its value is unreliable, if not imaginary.⁹⁹ The advantage to be derived from it is too ephemeral or indeterminate.¹⁰⁰ It is utterly impracticable to define any standard by which to estimate the professional advantage derived from it.¹⁰¹ The difficulty seems to be in fixing a value upon it. If the parties have fixed the value, the courts have no hesitancy in recognizing the existence of the professional good will.¹⁰²

3. *Brokers, commission merchants and insurance agents.* In *Raymond v. Vaughan*,¹⁰³ the parties were brokers in the wholesale sugar market. One partner was committed to the asylum; the other continued to carry on the business. The latter was required to account for the good will of the business. Fourteen years later, the same Illinois court criticised the case, saying "We see no reason why there should be good will to such a business independent of a special contract, more than in a business purely professional, as in the case of a physician or attorney at law."¹⁰⁴ The court concluded, as a matter of law, that commission merchants had no good will of which the court could take cognizance in the absence of a special contract. The court approved of the Chancellor's exclusion of the proof of custom with reference to the good will and the evidence of its value, although it appeared that the firm was a going concern, doing a business, the net profits of which amounted to more than \$5,000 a month, with customers scattered over the United States. However, twenty years later, in *Witkowsky v. Affeld*,¹⁰⁵ Illinois held that in an insurance agency, the good will was an asset to which the deceased partner is entitled to share. As early as 1858, in speaking of commission merchants, Sir John Stuart said "The nature of the business was such as to make the good-will a matter of value. In previous partnerships for carrying on the same sort of business

⁹⁸SMITH, MERCANTILE LAW (Pomeroy ed. 1887) § 247.

⁹⁹Slack v. Suddoth, 102 Tenn. 375, 379, 52 S. W. 182 (1899).

¹⁰⁰M'Farland v. Stewart, 2 Watts 111, 112 (Pa. 1833).

¹⁰¹Holden's Adm'rs v. M'Makin, 1 Pars. Eq. Cas. 270, 302 (Pa. 1847).

¹⁰²*Supra* note 69. See *Bozon v. Farlow*, 1 Mer. 459 (1816); *Aubin v. Holt*, 2 K. & J. 66 (1855).

¹⁰³17 Ill. App. 144 (1885).

¹⁰⁴Douthart v. Logan, 86 Ill. App. 294, 313 (1899).

¹⁰⁵283 Ill. 557, 119 N. E. 630 (1918).

the good-will had been the subject of stipulation. It must, therefore be held to be of some value."¹⁰⁶

In *Wilson v. Williams*,¹⁰⁷ the Vice Chancellor declared that the good will of stockbrokers would be valueless in the absence of a restrictive covenant. Burdick says that such statements are based upon the narrow definition of Lord Eldon.¹⁰⁸ The Vice Chancellor said, "Without going so far as to lay down any hard and fast rule as to the stockbrokers' business being, in every case, incapable of goodwill, I hold that in this case there is no salable goodwill."¹⁰⁹ In *Hill v. Fearis*,¹¹⁰ the court thought that it was impossible to say that the advantage that came from being the successor of an old stockbroker and carrying on the original business had no pecuniary value. The court seemed to think that if the Vice Chancellor had had before him the speeches of the learned Lords in *Trego v. Hunt*, he would not have decided the case on the same narrow notions of good will.

However, courts differ not merely in their notions of good will but also in their comprehension of the significance of facts. In the insurance cases,¹¹¹ one court says that the agencies which the partnership had secured were terminable at the will of the principals, and there could be no property in them.¹¹² Another court replies "Notwithstanding the precarious value of such right, there seems to be no good reason why it should not be recognized and protected by the law."¹¹³ Why? Because it is a valuable interest.¹¹⁴ Purchasers can be found who would be willing to pay a large consideration for such an interest in an established agency. A judge can not discover that fact in studious isolation. If the court excludes all evidence of custom as to good will and its value, its decision will be deduced from predetermined conceptions. Dean Pound has reminded us that the "Liberalizing of the English law through the law merchant was brought about by substituting business practice for juridical

¹⁰⁶*Macdonald v. Richardson*, 1 Giff. 81, 86 (1858).

¹⁰⁷29 L. R. Ir. 176 (1892). *Accord*: *Davis v. Hodgson*, 25 Beavan 177 (1858). *Cf. In re Brown*, 242 N. Y. 1, 150 N. E. 581 (1926).

¹⁰⁸*Supra* note 65.

¹⁰⁹*Supra* note 107 at 184. *Accord*: *Scudder v. Ames* (commission merchants), 142 Mo. 187, 43 S. W. 659 (1897).

¹¹⁰1 Ch. 466 (1905).

¹¹¹The good will of insurance agents was recognized in *Barber v. Conn. Mutual Life Ins. Co.*, 15 Fed. 312 (Cir. Ct. N. D. N. Y. 1883) and *Sheppard v. Boggs*, 9 Neb. 257, 2 N. W. 370 (1879). *Contra*: *Smith v. Smith*, 51 La. Ann. 72, 24 So. 618 (1898); *Tierney v. Klem*, 67 Miss. 173, 6 So. 739 (1889); *Dyer v. Shove*, 20 R. I. 259, 38 A. 498 (1897); *Rice v. Angell*, 73 Tex. 350, 11 S. W. 338 (1889).

¹¹²*Rice v. Angell*, *supra* note 111 at 354.

¹¹³*Barber v. Conn. Mutual Life Ins. Co.*, *supra* note 111 at 313.

¹¹⁴In *Thompson v. Winnebago Co.*, 48 Ia. 155 (1878) the administrator was compelled to account for the good will of a land agent.

conceptions."¹¹⁵ The problem of the law is one of continuous adaptation. New interests, which have arisen in the development of modern business methods,¹¹⁶ can be accorded just recognition by the law only by a proper appreciation of their factual significance.

4. *Editors.* Under a statute, enacted in Maryland in 1798, the court held that the good will of a newspaper, the *American Chronicle*, was not an asset in the hands of the administrator because it was of "inappreciable value, and of too uncertain and contingent a nature to be the subject of appraisement and estimation."¹¹⁷ In the reign of George II, however, the executrix of the printer¹¹⁸ of *St. James's Evening Post* was obliged to account for the good will of it to the children of the printer, who claimed under the will and custom of London. In purely literary partnerships, it has been said, the doctrine, which repudiates the existence of anything like good will, would be applied. But, in a quasi literary partnership like the *Saturday Courier*, a newspaper,¹¹⁹ the chief value of which consisted in the subscription list and good will, clearly a different one must apply. The evidence in the case showed that the deceased, Holden, had charge of the editorial department and by his literary ability had given the paper such a reputation as to increase its circulation from 22,000 to 55,000. The court justifies allowing for the good will on the ground that a great portion of the material in the journal was not the product of the editor, but the usual melange which fills up the modern (1847) newspaper, advertisements among other things. A significant fact was that the mechanical equipment had been appraised at \$3,000 and the subscription list and good will, which, in 1861, Maryland regarded as valueless, was appraised at \$60,000. The good will of a newspaper has been declared¹²⁰ to be more tangible than the probability that the customers will resort to the old place or than a restrictive covenant. The court does not give the test of tangibility by which it arrived at this conclusion. The good will of a newspaper is often its greatest value. In *Dayton v. Wilkes*,¹²¹ upon the dissolution of the partnership in 1859, the court appointed a receiver to protect the good will of *Porter's Spirit of the Times*. Why has there been such ready legal recognition of the good will of a

¹¹⁵*Supra* note 26 at 611.

¹¹⁶*Macfadden v. Jenkins* (real estate and loan business) 40 N. D. 422, 169 N. W. 151 (1920).

¹¹⁷*Seighman v. Marshall*, 17 Md. 550, 569 (1861).

¹¹⁸*Gibblett v. Read*, 9 Mod. 459 (17 Geo. 2) (1743).

¹¹⁹*Holden's Adm'rs v. M'Makin*, *supra* note 101.

¹²⁰*Boon v. Moss*, 70 N. Y. 465, 474 (1877).

¹²¹17 How. Pr. 510 (1859).

newspaper, from the days of George II, which antedate Lord Eldon's famous pronouncement as to what constitutes good will? Vice Chancellor Pitney suggests that it is because "The newspaper is an established institution of modern society. It supplies an absolute need or want. Society could not go on without it. Among its requisites are that it should have continuity, and to that end, a name by which it is known, and which gives it identity and enables it to have continuity independent of ownership."¹²²

One of the most finely human cases to be found in the books is *Bradbury v. Dickens*.¹²³ Charles Dickens entered into partnership with his printers and publishers to establish a weekly periodical, *Household Words*. Dickens was appointed editor with absolute control over the literary department. As editor and for such articles as he might contribute, he was to receive a compensation of £500 annually; as partner, he was to receive half of the profits. A misunderstanding brought about a dissolution of the partnership ten years later. Dickens gave notice to the public that *Household Words* would be discontinued and he would establish, as its successor, another weekly periodical. His partners sought to enjoin him from appropriating to himself, or from doing damage to, the "continuity, goodwill and succession" of *Household Words*. They also prayed that the copyright of *Household Words* be forthwith sold as a going concern. Dickens' counsel opposed the sale because the very essence of the work was Mr. Dickens. With his retirement, it must cease. They urged that any attempt to continue it without the mental machinery which gave it value would be a fraud upon the public. It might do serious injury to the literary reputation of Mr. Dickens. The Master of the Rolls, Sir John Romilly, felt the force of the argument very strongly. He said, "His mere retirement may *de facto* annihilate it, for its existence and value may entirely and solely depend on his name being associated with it."¹²⁴ Then, he wisely added, "That however is a matter which can only be determined by the result." The name was sold at auction because he was of the opinion that it belonged to the partners regardless of its value. Much to Sir John's surprise, it brought the nice little sum of £3,550. When his prophecy failed, the prophet felt the necessity of explaining how it happened. At least, explanation under such circumstances is customary. At any rate, in *Melersh v. Keen*,¹²⁵ he said that, in *Bradbury v. Dickens*,

¹²²Lane v. Smythe, 46 N. J. Eq. 443, 454, 19 Atl. 199 (1890).

¹²³27 Beavan 52 (1859).

¹²⁴*Supra* note 123 at 61.

¹²⁵28 Beavan 453, 455 (1860).

"I entertained a very considerable doubt whether the mere right of using the title *Household Words* was worth anything, and my belief now is that if Mr. Dickens had not bid for it for himself, it would have sold for little or nothing." In other words, if those who are most interested in buying an article sold at auction, do not bid on it, that which is sold will bring little. The world is not apt to quarrel with Sir John on that proposition.

5. *Musicians*. A similar question arose in *Bailly v. Betti*.¹²⁶ A group of distinguished artists entered into partnership to give musical performances under the name of the *Flonzaley Quartet*. Subsequently, when notice of dissolution of the partnership was given, it was denied that Bailly had any interest, as partner, in the assets except in some sheet music. It appeared that the other partners had announced that a fourth person would be secured in place of Bailly and that the *Flonzaley Quartet* would continue to give its musical performances. Bailly sought an accounting; he asked for a sale of the assets of the partnership, including the firm name, and an injunction restraining them from giving musical performances under the firm name. The Court of Appeals of New York approved of the views of the lower courts that the name *Flonzaley Quartet* was not an asset which could be sold and its proceeds distributed among the partners.¹²⁷ It considered that good will included the firm name only in commercial partnerships, where good will includes "such elements as reasonable prices, good quality of merchandise, and fair dealing, which are more or less impersonal." The court concluded "It has, however, never been held that a business dependent solely on the personal skill and professional qualifications of the persons carrying it on could be sold or be transferred to any one who might desire to purchase on a sale."¹²⁸

Why is not fair dealing personal? How can there be reasonable prices unless there is managerial efficiency? How can there be a good quality of merchandise unless there is a superiority in the selection of goods or the choosing of others to do it that betokens good judgment? The court, however, seems to overlook what was the controlling element of the case. Was there an advantage which could be made available to a vendee? In *Trego v. Hunt*,¹²⁹ Lord Herschell approved the declaration of Sir George Jessel that "Attracting customers to the business is a matter of carrying it on. It is the

¹²⁶241 N. Y. 22, 148 N. E. 776 (1925).

¹²⁷A criticism of the case will be found in a note in (1926) 11 CORNELL LAW QUARTERLY 256.

¹²⁸*Supra* note 126 at 26.

¹²⁹*Supra* note 9 at 17.

formation of that connection which has made the value" of the good will.¹³⁰ Its value depends upon what can be got for the chance of being able to keep that connection. Or as he said "It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money."¹³¹ If that advantage can be made available to a vendee, it is a partnership asset.

A corporate name does not import a declaration that the individuals, whose names appear therein, will always remain in the corporation.¹³² Any group of men whose membership may change is an entity separate from its constituent members.¹³³ To refuse to recognize the existence of a partnership or voluntary association as an entity is to shut one's eyes to the facts.¹³⁴ Whether one means a unit entity or a group entity is of no importance in solving the problem.¹³⁵

Suppose that the *Flonzaley Quartet* had received each year several thousand dollars worth of engagements without solicitation, is there any doubt that such an advantage was of distinct value and could be made available to the successors of the group which had dissolved partnership? Since the decision of *Bailly v. Betti*, the present group advertises that "In the twenty-two years of its existence the *Flonzaley Quartet* has made its name the standard in chamber music by which all other string quartets are judged." Their advertisements disclose that the present group has appropriated a valuable advantage, which belonged to the dissolved partnership. The fact that they have continued to use the name is indicative of the benefit derived from it.¹³⁶ The advantage derived from the familiarity of the public with the name, which was the result of years of effort and expense in advertising and solicitation, has been wrongfully appropriated by them.¹³⁷

Compare this case with *Messer v. The Fadettes*.¹³⁸ In 1888, Ethel Atwood organized an orchestra under the name of *Fadette's Ladies Orchestra*. In 1895, the organizer sold to the plaintiff all her right,

¹³⁰*Genisi v. Cooper*, *supra* note 7.

¹³¹*Supra* note 9 at 24.

¹³²*Holmes et al. v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 297 (1870).

¹³³Machen, *Corporate Personality*, (1910) 24 HARV. L. REV. 253, 259.

¹³⁴*Supra* note 133 at 260.

¹³⁵Drake, *Partnership Entity and Tenancy in Partnership; The Struggle for a Definition* (1916) 15 MICH. L. REV. 609.

¹³⁶*Shaver v. Shaver*, 54 Ia. 208 (1880).

¹³⁷*Rowell v. Rowell*, 122 Wis. 1, 17, 99 N. W. 473 (1904); *Beninger v. Clark*, 10 138 Abb. Pr. (N. S.) 264, 268 (1870).

¹³⁸168 Mass. 140, 46 N. E. 407 (1897).

title and interest in the organization, together with her right to the name *Fadette's Ladies Orchestra*. At the time of the sale, and for some time thereafter, the orchestra was composed substantially of the same members as before the sale. Subsequently, some members withdrew from it and incorporated as *The Fadettes* and gave musical concerts. The plaintiff sought to enjoin the use of the name which she had purchased. The court found that the success of the orchestra was due to the ability, skill and personal supervision of Atwood and was not assignable. It said that any influence beneficial to the plaintiff, that the name would have upon the public would be to mislead and defraud them by implying that she and such musicians as she employed were the same persons who had formerly gained a good reputation under this name." At the time of filing of the bill no member of the former organization, except the plaintiff, remained. After the sale, it appeared that the plaintiff had given at least one entertainment under the name of *Fadette's Ladies Orchestra*. The members of the original orchestra had not agreed to remain with the plaintiff's organization. The injunction was refused.

There was, however, a dissenting opinion. It was based upon the ground that the name had been sold with a going concern. Both with fervor and with pertinency, the dissenting judge said "The *Boston Symphony Orchestra* owes its fame to its various leaders. If this name is a trade name it is assignable. Could it be held that members of the orchestra who chose to leave it could associate themselves together and perform under this name without being liable to be restrained by injunction?"¹³⁹

Of course, the name of "Sousa" in connection with the band implies his skill, science and art.¹⁴⁰ Even against him, the assignment of his name will not be enforced in equity, because it would be a fraud and imposition upon the public. Similarly, the former employees appearing in *Christy's Minstrels* will be restrained from appropriating that name, to which Christy had given repute by the expenditure of time, labor and money.¹⁴¹

In the case of the *Flonzaley Quartet*, either the name was personal or it was not. In any event, each member of the quartet had the same right to its use after dissolution if the name was not sold. It was not sold, because the court would not permit it to be. If the decision on *The Fadettes* is sound,¹⁴² then the New York Court of

¹³⁹*Supra* note 138 at 144.

¹⁴⁰*Blakely v. Sousa*, 197 Pa. 305, 333, 47 Atl. 289 (1900).

¹⁴¹*Christy v. Murphy*, 12 How. Pr. 77 (N. Y. 1856).

¹⁴²The New York Court of Appeals cites the case with approval in *In re Brown*, 242 N. Y. 1, 11, 150 N. E. 581, 584 (1926).

Appeals was in error in refusing to grant the injunction restraining the defendants from the use of the name. The implication in the case of *The Fadettes* is that if the assignee had not attempted to use the name which was assigned, she would have been guilty of no fraud on the public and to protect the good will which she purchased the court would have restrained the defendants. Consistency required the New York court to order a sale of the name as an asset of the partnership.

The good will of a firm may be inseparable from the firm name.¹⁴³ It is conceded that where the firm name designates the business, and not merely the existing individuals, it belongs to the partnership. The buyer's right to use impersonal names is generally well settled.¹⁴⁴ A fictitious name is an impersonal one. It can be assigned with the business.¹⁴⁵ No one can acquire the right to deceive the public.¹⁴⁶ Therefore, the contract of a physician to practice in the name of another is void.¹⁴⁷ An artist, who has acquired a reputation which gives his works a higher market value than those of another, cannot give the right to affix his name because it would be fraud upon the public.¹⁴⁸ But, one firm can acquire the right to represent itself as the legitimate successor of another. In doing so, it represents that the old firm is extinguished and it is continuing the same kind of business and enjoying its good will.¹⁴⁹ Where the value of good will lies in succession, what difference does it make whether the good will is personal or otherwise, if a buyer can be found for it?¹⁵⁰ In both cases just considered, the advantages that would come from a direct succession and continuation of the business were of great advertising value. Where there is no fraud,¹⁵¹ if the advantage can be made available to the vendee, it ought to be sold.

Lindley says that the good will of a partnership may be practically

¹⁴³*Slater v. Slater*, 175 N. Y. 143, 147, 67 N. E. 224 (1903).

¹⁴⁴*Williams v. Farrand*, *supra* note 54 at 487.

¹⁴⁵*Rowell v. Rowell*, *supra* note 137 at 20, 479; *MECHEM*, *supra* note 15 at 116.

¹⁴⁶*ALLAN*, *supra* note 17 at 22.

¹⁴⁷*Jerome v. Bigelow*, 66 Ill. 452 (1872).

¹⁴⁸*Leather Cloth Co. Ltd. v. Am. Leather Cloth Co. Ltd.*, 11 H. L. Cas. 523, 545.

¹⁴⁹*Hutchins v. Page*, 204 Mass. 284, 90 N. E. 565, 566 (1910); *Morgan v. Schuyler*, 79 N. Y. 490, 495 (1880).

¹⁵⁰"Men will pay for any privilege that gives reasonable expectation of preference in the race of competition. . . . At one extreme there are expectancies so strong that the advantage derived from economic opportunity may be said to be a certainty; at the other are expectancies so weak that for any rational mind they may be said to be illusory. We must know the facts in any case." *Cardozo, J., In re Brown*, *supra* note 142 at 6 and at 582.

¹⁵¹*In Grow v. Seligman*, 47 Mich. 607, 11 N. W. 404 (1882), for the vendee of a clothier to carry on the business under the name of "Little Jake," his vendor's trade name, the court held, would be to mislead the public.

unsalable and worthless to any one excepting a former partner.¹⁵² To give efficacy to the sale, any of the partners may become purchaser. If it is not salable, it cannot be treated as an asset. Courts have strained for reasons for not selling professional good will. The most artificial of all is presented in a Tennessee case, *Slack v. Suddoth*.¹⁵³ There, the court said that good will "implies something gained by consent, not something realized by force or coercion." Yet, that case was decided forty years after Vice Chancellor Wood said that good will was "all that good disposition which customers entertain towards the house of business identified by a particular name." Wooing tactics may be necessary if the vendee is to secure the good will of his vendor for which he bargains. Whether the sale is voluntary or involuntary, the tactics would be the same.

6. *Bankers*. In *Read v. Mackay*,¹⁵⁴ a firm of bankers and brokers dissolved partnership. The business was founded in 1832 and Vermilye had been a part of the firm name from the origin of the business, although it had been carried on by many successors. After 1862, the business was known as Vermilye & Co. At dissolution, the partners could not agree as to the disposition of the name. It does not appear that there was any partner by the name of Vermilye in the firm. The plaintiff sought to enjoin the use of the firm name by the defendants and asked that the good will of the partnership be sold to the highest bidder. The court's ethical sense would not permit the firm name to be transferred to a purchaser promiscuously selected at a sale. It seemed to fear that the highest bidder would be the one most in need and least entitled to wear it. With great warmth, it says "What suggestion of morality, inductive or intuitive, supports the claim that one person should be permitted by purchase to assume the good repute of others? I say good repute, for in that only is the value of a firm name to be found which has remained personal to the members of the firm collectively."¹⁵⁵ The court admits that if the partners had voluntarily sold the name for the benefit of all, it would have been proper. But to allow a sale under a decree and supervision of a court of equity would shock one's moral sense. The court approved the *dicta* of Commissioner Dwight that "It seems plain that if a banking house had acquired a name, such as that of Baring Brothers, though there was no partner of the

¹⁵²*Supra* note 16 at 539. *Goodwill and Injunctions against Dealing With Customers of the Business* (1880) 24 SOL. J. & REP. 833. WOERNER, *supra* note 16 at 438; *Williams v. Wilson*, 4 Sandf. Ch. 379, 381 (N. Y. 1846).

¹⁵³*Supra* note 98 at 381.

¹⁵⁴47 Misc. 435, 95 N. Y. Supp. 935 (Sup. Ct. N. Y. Sp. Term 1905).

¹⁵⁵*Supra* note 154 at 437.

name of Baring, it would, on general principles of law, and independent of a statute preventing the use of fictitious names, have a property in such name."¹⁵⁶ The logic of the court is not very convincing. It says that "the business name of this partnership is the symbol used to denote the personal integrity and business qualities of the present parties, the parties to this action, and this symbol cannot be detached from the personnel of the partnership and sold as an asset with the good will . . . There must be imported into the articles of a partnership, the business of which is dependent upon personal attributes of the members of the firm and the confidence of the patrons therein, a mutual understanding that with the termination of the partnership the use of the firm name shall come to an end, unless the partners have otherwise expressly provided, which is not here the case."¹⁵⁷ This means that ethically professional good will, when attached to a name, which is the symbol of personal integrity, can be alienated by voluntary sale, but not by forced sale. Such a distinction seems insubstantial. The court, however, enjoined the unauthorized use of the name by one partner to protect the interest of the other. This was not the result that the court arrived at in the case of the *Flonzaley Quartet*. There the court would not prevent some of the partners from appropriating the name on dissolution of the partnership.

In an early case,¹⁵⁸ in Pennsylvania, the court was unable to comprehend how the good will of a banking firm could exist independently of the property. The good will of a banking business may be assigned and passed as assets for the benefit of creditors.¹⁵⁹ One who, as surviving director, wrongfully appropriated the good will of the *Bank of Viroqua*, a corporation, was required to account for the right to use its name as its successor. As trustee, he was bound to dispose of the good will with the tangible assets in the most advantageous manner.¹⁶⁰ In *Smith v. Everett*,¹⁶¹ the bank was carried on under the name of the *New Sarum Bank*. Smith died and Everett took in a new partner, who paid him £10,000. The surviving partner was obliged to pay £2,000 as Smith's share of the good will. Sir John Romilly said "He might not have been entitled to use the words, *New Sarum Bank*; but provided there was no bank in Salisbury called the *Old Sarum Bank*, he might have changed the word 'new' into

¹⁵⁶Glen & Hall Mfg. Co. v. Hall, 61 N. Y. 226 (1874). This *dicta* is also quoted in *Hegeman v. Hegeman*, 8 Daly 1, 11 (N. Y. 1880).

¹⁵⁷*Supra* note 154 at 441.

¹⁵⁸Musselman and Clarkson's Appeal, 62 Pa. 81 (1869).

¹⁵⁹Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 549 (1896).

¹⁶⁰Lindermann v. Rusk, 125 Wis. 210, 104 N. W. 126 (1905).

¹⁶¹27 Beavan 446 (1859).

'old,' and carried on the business under that name and in exactly the same place. It is therefore easy to see that the price which could have been obtained by the sale of the goodwill, that is the right to carry on the business under the name of the *New Sarum Bank* was exceedingly small, not to say infinitesimal."¹⁶² In *Mellersh v. Keen*,¹⁶³ a banking partnership was dissolved because of the mental derangement of Keen. The court decreed an account to be taken of the good will. Again, Sir John was faced with the difficulty of ascertaining the value of good will, that entity of shadowy character. Eight or nine bankers testified that it was "worth nothing." Yet, Sir John approved the finding of the Chief Clerk that it was worth about £2,300.

CONCLUSION

A review of the cases seems to disclose that during the first half century which followed Lord Eldon's decision of *Crutwell v. Lye* (1810), the primitive idea that good will must have a physical attachment was dominant. Since *Churton v. Douglas* (1859), there has been a more rational application of the concept of good will according to the facts of the different cases. The liberalizing influence of the pronouncements in *Trego v. Hunt* (1896) seems to have caused many courts to recognize that the value of mere succession has been greatly enhanced by the emphasis which modern advertising has given to psychical influences.

Certainly, a study of the decisions demonstrates amply the futility of attempting to define good will in terms of any specific advantage which may exist in any given case or group of cases. The difficulties encountered by the courts seems to have been due to the application of limited formal rules to situations which were constantly, if not progressively, changing or which were dissimilar. The courts have failed to realize that the advantage which may arise from good will is dependent upon a diversity of factors, so varying as to defy exclusive enumeration. The significant facts are the existence of a good will and its availability to a vendee.

That a business may not have a good will is clear.¹⁶⁴ That professional good will may in fact exist equally admits of no doubt. But, in the case of a lawyer or a physician, in the absence of a special contract fixing a value upon it and protecting it by a restrictive

¹⁶²*Supra* note 161 at 452.

¹⁶³27 Beavan 236 (1859).

¹⁶⁴*Schaefer Brewing Co. v. Moebs*, 187 Mass. 571, 73 N. E. 858 (1905); *Fox v. Produce Cold Exchange*, 192 Ill. App. 301 (1915); *WOERNER*, *supra* note 16.

covenant, when necessary, it is difficult to see how the court can give effective legal recognition to its factual existence. Many courts, however, have failed to perceive that in origin good will is largely personal. They have confused the result with the means. The rigid classification of good will into local and personal has obscured the issue in many cases. The question is not: Is the good will personal? The solution of any controversy regarding good will seems to be dependent upon two questions: 1. Does good will in fact exist? 2. May the benefit of it, under the circumstances, be made available to the vendee without fraud upon the public? If these two questions can be answered in the affirmative, what the source of the good will was, would appear to be of no consequence. If the law is to be consonant with fact, the court must recognize good will as far as is effectively possible. To the extent that it fails, it fails as an instrument of justice.